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THE EFFECT OF ECONOMIC DEPRESSION UPON FORECLOSURE*

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An economic depression, world wide in its scope and affecting all nations and peoples, cannot be viewed as anything less than catastrophic. This financial and economic collapse has resulted in the destruction of markets for all property, real and personal alike, and has impoverished many hitherto reposing in supposed financial security; it has caused the loss of the savings of a lifetime for hundreds of thousands of individuals; and it has imperiled and in many instances destroyed long established business enterprises operated under conservative and efficient management.

In a time of such grave financial distress a new element obtrudes itself, creating an embarrassing situation, not so much in the legalistic as from the practical aspect. While no system of jurisprudence has viewed with greater abhorrence, the

*No attempt is made in this treatise to enter into a dissertation on the effect, or the constitutionality of the various statutes enacted by state legislatures providing for mortgage moratoria. The principles herein discussed relate solely to the inherent power of equity, aside from statute, to intervene in times of economic depression and stay mortgage foreclosure because of the resultant hardships attending such proceedings.

A majority of the reported cases pertinent to this subject deal primarily with the judicial sale of real estate under foreclosure of mortgages or deeds of trust, but it is submitted that the same general principles of law are applicable to the foreclosure of corporate mortgages and to the sale of securities, or other property pledged or hypothecated as security for loans. It was held in Suring State Bank v. Giese (1933), 210 Wis. 489, 493, 246 N. W. 556, 557, that a court should ordinarily exercise the same power in cases of farm mortgages as in cases of corporate foreclosures, and *per contra*, then, the court should apply the same principles of law in the foreclosure of corporate mortgages as is applicable to the foreclosure and sale of farm lands.

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abrogation, direct or indirect, of contractual responsibility, nor has more strenuously resisted interference with the natural intendment of contract than has English and American law, still such an unprecedented situation as has recently confronted us has caused the law to seek to ameliorate obligations ordinarily unhesitatingly enforced, but which under the existing conditions result undeniably in uncontemplated disaster, if not destruction. Throughout the land American tribunals have strained to the utmost to alleviate inequitable oppression resulting from the effect of bond and mortgage default. Courts have in many instances sought to circumscribe the effect of foreclosure, in recognition of this change which has rendered security insecure, and transformed prosperity into indigence.[1]

Such a situation may necessitate new applications of legal and equitable rules and concepts requiring the courts to render their judgments with more fidelity to economic facts, with more general utility, and in partial or complete disregard of rules conceived in the past, upon the basis of totally different postulates and world conditions.[2]

In Wisconsin the Supreme Court has taken a somewhat revolutionary stand, but at the same time unassailable in logic and justice. Judge Wickham, in *Suring State Bank* v. *Giese*[3] said: "The Court may, upon application for the confirmation of a sale, * * * conduct a hearing, establish the value of the property, and as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. * * * If the fair value as found by the court, when applied to the mortgaged debt, discharges it, there will be no occasion for the entering of a deficiency judgment. In case this procedure is adopted by the court, the option should be given to the plaintiff to accept or reject it. In the event of its rejection, the resale

[1] Bank of Manhattan Trust Co. v. Ellda Corp. (1933), 147 Misc. (N. Y.) 374, 265 N. Y. S. 115; Fifth Ave. Bk. of New York v. Compson (1933), 113 N. J. Eq. 152, 166 Atl. 86; Security Bldg. & Loan Assn. v. Grande (1928), 102 N. J. Eq. 320, 140 Atl. 580; Teachers Retirement Assn. v. Pirie (1935), 150 Ore. 435, 46 P. (2d) 105; Cashin v. Alamac Hotel (1925), 98 N. J. Eq. 432, 131 Atl. 117; Davis v. Flagg (1882), 35 N. J. Eq. 491.

[2] Fifth Ave. Bk. of New York v. Compson (1933), 113 N. J. Eq. 152, 166 Atl. 86.

[3] 210 Wis. 489, 493, 246 N. W. 556, 558 (1933).

of the property should be ordered." Other courts have followed the Giese case.[4]

The effect of the doctrine in the Giese case has, however, been limited to the extent that before the mortgagor can effect a delay in the confirmation of a foreclosure sale until a fair value of the premises is credited on a deficiency he must first affirmatively show, (1) sale at an unconscionable figure; (2) at a nominal bid plus the absence of competitive bidding due to some fact beyond his control, and facts sufficient to invoke equitable relief; (3) the existence of an emergency because of which he was unable to protect himself by refinancing or otherwise; and (4) his own inability, through lack of financial resources or otherwise, to protect himself at the sale.[5]

We therefore approach the more recent suits for foreclosure of mortgages with an enlarged conception of the duty imposed upon a court to see that justice is done to all interested parties; and we find that equity in particular has exercised a somewhat dictatorial supervision in such cases and in many instances imposed heretofore unthought of conditions.[6]

Courts which have a true conception of the philosophy of equity jurisprudence constantly reiterate the fact that equity meets all conditions; that human ingenuity and human affairs cannot create a condition which the long arm of equity cannot reach, if an injustice or wrong would otherwise result. Equity's modes of relief are not fixed and rigid; it can mold its remedies to meet the conditions with which it has to deal.[7] "Let the hardship be strong enough," said Justice Cardozo, "and equity will find a way, though many a formula of inaction may seem to bar the path."[8] But this is a power which is sparingly used and certainly not merely to delay a sale on the bare possibility that

[4] Clinton Trust Co. v. 142-144 Joralemon St. Corp. (1933), 237 App. Div. (N. Y.) 789, 263 N. Y. S. 359; Graselli Chem. Co. v. Aetna Explosives Co. (1918), 252 Fed. 456.

[5] Young v. Weber (1934), 117 N. J. Eq. 242, 175 Atl. 273; Fed. Title & Mtg. Guar. Co. v. Lowenstein (1933), 113 N. J. Eq. 200, 166 Atl. 538; Maher v. Usbe Bldg. & Loan (1934), 116 N. J. Eq. 475, 174 Atl. 159.

[6] Bank of Manhattan v. Ellda (1933), 147 Misc. (N. Y.) 374, 265 N. Y. S. 115.

[7] Teachers Retirement Fund Assn. v. Pirie (1935), 150 Ore. 435, 46 P. (2d) 105; Rice v. Van Vranken (1928), 132 Misc. (N. Y.) 82, 229 N. Y. S. 32; Graselli Chem. Corp. v. Aetna Expl. Co. (1918), 252 Fed. 456; Harrigan v. Gilchrist (1904), 121 Wis. 127, 99 N. W. 909.

[8] Graf v. Hope Bldg. Corp. (1930), 254 N. Y. 1, 13, 171 N. E. 884, 888.

the property would increase in value at some future date, thereby making the court an instrument of speculation on future property values.[9] "The fact of depression in value" said Justice Blatchford, "is no ground in itself for not upholding a sale under the trust deed, nor is a subsequent rise in value a ground for setting aside the sale. Those who speculate in real estate on credit take the risk of depression in value at the time the credit expires, and those who buy for cash in time of depression are entitled to the benefit of a subsequent rise in value."[10]

The rights of a mortgagee demand the protection of a court of equity no less than those of the mortgagor; and it is of the highest interest to the public welfare that no judicial action be taken which renders a real state mortgage less desirable as an investment, a result which quite possibly might follow from indiscriminate restraints in foreclosure proceedings; and equity should interpose no impediment to obstruct the process of law in the orderly pursuit by a holder of a mortgage for the lawful collection of the debt thereby secured, except where it is clearly necessary for the protection of a countervailing equity.[11]

The interference with regular procedure in foreclosure suits has been uniformly frowned upon by courts of equity. They have always been reluctant under any circumstances to grant injunctive relief from the exercise of a power of sale conferred by contract, and unless such power is prohibited by law it will usually be permitted to be exercised in accordance with the agreement of the contracting parties.[12] Except in cases where a statute gives an absolute right to an injunction, an injunction, whether temporary or permanent, cannot as a general rule, be sought as a matter of right, but its granting or refusal rests in the sound discretion of the court considering the circumstances

[9] Fifth Ave. Bank of New York v. Compson (1933), 113 N. J. Eq. 152, 166 Atl. 86; Kotler v. John Hancock Mutual Life Ins. Co. (1933), 113 N. J. Eq. 544, 168 Atl. 36; Graselli Chem. Corp. v. Aetna Expl. Co. (1918), 252 Fed. 456; Lipscomb v. New York Life Ins. Co. (1897), 138 Mo. 17, 39 S. W. 465.

[10] Smith v. Black (1885), 115 U. S. 308, 318, 6 Sup. Ct. 50, 55.

[11] Haywood v. Rigsbee (1935), 207 N. C. 695, 178 S. E. 108; Marneil Realty Corp. v. Twin Brook Realty Corp. (1935), 119 N. J. Eq. 205, 181 Atl. 882; Fifth Ave. Bank of New York v. Compson (1933), 113 N. J. Eq. 152, 166 Atl. 86; Mellen v. Edwards (1934), 179 Wash. 272, 37 P(2d) 203; United Bldg. & Loan Assoc. v. Neuman (1933), 113 N. J. Eq. 244, 166 Atl. 537; Free v. Harris (1930), 181 Ark. 644, 27 S. W. (2d) 510; Cashin v. Alamac Hotel Co. (1925), 98 N. J. Eq. 432, 131 Atl. 117; Davis v. Flagg (1882), 35 N. J. Eq. 491.

[12] High on Injunctions, 4th Ed., Sec. 456.

and facts of each individual case. This general rule applies with equal force whether the injunction sought is preventive or mandatory, and it also applies to the issuance of a restraining order.[13]

Equity cases are in harmony in holding that, where the interests of minors or incompetents are not involved, it is a well settled rule, that, in the absence of fraud or misconduct, an unpropitious market for the sale of property is no ground for enjoining a sale, and an injunction to restrain the sale will not be granted because the property in question is about to be sold for cash at a forced sale, at a time when in consequence of a generally prevalent depression and extreme scarcity of money, or because of the season of the year, the sale will be attended with great if not irreparable pecuniary loss and sacrifice. Nor will the court in the absence of extenuating circumstances, refuse confirmation or set aside a sale attending a lawful and orderly foreclosure merely because the time was unpropitious for the sale, or because the sale was made during a period of financial stringency or economic depression.[14] And one who has pledged

[13] Graham v. Currier (1922), 151 Minn. 162, 186 N. W. 229; Wilser v. Wilser (1916), 132 Minn. 167, 156 N. W. 271; Coppey v. Keady (1914), 81 Ore. 218, 139 Pac. 108; 32 C. J. 29.

[14] Anderson v. White, 2 App. (D. C.) 408 (1894); Speers Sand & Clay Works v. American Trust Co., 52 F. (2d) 831 (1931); Bethlehem Steel Co. v. International Combustion Eng. Corp., 66 F. (2d) 409 (1933); *In re* Yost & Cook, 70 F. (2d) 614 (1934); Equitable Life Assur. Society v. Vaughn, 82 F. (2d) 978 (1936); Guaranty Trust Co. v. Williamsport Wire Rope Co. 20 F. Supp. 634 (1937); Denson v. Provident Mutual Life Ins. Co., 231 Ala. 574, 166 So. 33 (1936); Wells v. Lenox, 108 Ark. 366, 159 S. W. 1099 (1912); Horn v. Hull, 169 Ark. 463, 275 S. W. 905 (1925); Union & Planters Bank & Tr. Co. v. Pope, 176 Ark. 1023, 5 S. W. (2d) 331 (1928); Hawkins v. Wood, 179 Ark. 845, 18 S. W. (2d) 371 (1929); Royal v. McVay, 180 Ark. 973, 23 S. W. (2d) 983 (1930); Free v. Harris, 181 Ark. 644, 27 S. W. (2d) 510 (1930); Federal Land Bank of St. Louis v. Floyd, 187 Ark. 616, 61 S. W. (2d) 449 (1933); Bock v. Losekamp, 179 Calif., 674, 179 Pac. 516 (1919); Jones v. Sierra Ver. Water Co., 63 Calif. App. 254, 218 Pac. 454 (1923); Brennan v. American Trust Co., 3 Calif. (2d) 635, 45 P. (2d) 207 (1935); Calif. Securities Co. v. Grosse, 3 Calif. (2d) 732, 46 P. (2d) 170 (1935); Durst v. Battson, 9 Calif. (2d) 156, 69 P. (2d) 992 (1937); Deprisco v. Rykacewski, 18 Del. Ch. 212, 157 Atl. 209 (1931); Certain Lands v. Coronado Beach, 128 Fla. 884, 175 So. 775 (1937); Liles v. Bank of Camden County, 151 Ga. 483, 107 S. E. 490 (1921); Stanton v. Mortgage Guaranty Co., 179 Ga. 867, 177 S. E. 556 (1934); Kontz v. Citizens & Southern Nat. Bk. 181 Ga. 70, 181 S. E. 764 (1935); Hamilton v. Quimby, 46 Ill. 90 (1867); Wilson v. Ford, 190 Ill. 614, 60 N. E. 876 (1901); Worden v. Rayburn, 313 Ill. 495, 145 N. E. 101 (1924); Logar v. O'Brien, 339 Ill. 628, 171 N. E. 629 (1930); Clegg v. Christenson, 346 Ill. 314, 178 N. E. 925 (1931); Chicago Title & Trust Co. v. Robim, 361 Ill. 261, 198 N. E. 4 (1935); Illinois Joint Stock Land Bk. v. Conard, 288 Ill. App. 475,

certain shares of stock with a stock broker as collateral security for transactions between them, cannot enjoin their sale upon mere general averments of irreparable injury, or because the

6 N. E. (2d) 232 (1937); Chicago City Bank & Trust Co. v. Johnson, 293 Ill. App. 564, 13 N. E. (2d) 191 (1938); Durham v. Elliott, 180 Ky. 724, 203 S. W. 539 (1918); Smith v. Holowell, 201 Ky. 271, 256 S. W. 408 (1923); Burchfield v. Asher, 222 Ky. 108, 300 S. W. 331 (1927); Greer v. McAninck, 226 Ky. 644, 11 S. W. (2d) 696 (1928); Kentucky Joint Land Bank v. Fitzpatrick, 237 Ky. 624, 36 S. W. (2d) 25 (1931); Rohrs v. McGlasson, 250 Ky. 140, 61 S. W. (2d) 1087 (1933); Louisville Title Co. v. Ramsey, 258 Ky. 183, 79 S. W. (2d) 693 (1935); Fidelity & Columbia Tr. Co. v. White Const. Co., 258 Ky. 475, 80 S. W. (2d) 550 (1935); Oglesby v. Prudential Ins. Co., 259 Ky. 620, 82 S. W. (2d) 824 (1935); Henderson v. Henderson, 266 Ky. 319, 98 S. W. (2d) 904 (1936); Melton v. Tipton, 264 Ky. 196, 94 S. W. (2d) 350 (1936); Stallings v. Annapolis Sav. Inst., 167 Md. 4, 172 Atl. 283 (1934); Clemens v. Union Tr. Co., 170 Md. 520, 185 Atl. 462 (1936); Northland Pine Co. v. Northland Insulating Co., 145 Minn. 395, 177 N. W. 635 (1920); Standard Lumber Mfg. Co. v. Deposit Guaranty Bank & Tr. Co., 169 Miss. 120, 152 So. 639 (1934); Lemere v. White, 122 Nebr. 676, 241 N. W. 105 (1932); Metropolitan Life Ins. Co. v. Heany, 122 Nebr. 747, 241 N. W. 525 (1932); Federal Land Bank of Omaha v. Radke, 122 Nebr. 834, 241 N. W. 752 (1932); Physicians Casualty Assn. v. Brownfield, 133 Nebr. 906, 277 N. W. 599 (1938); Cashin v. Alamac Hotel, 98 N. J. Eq. 432, 131 Atl. 117 (1925); South Jersey Title & Finance Co. v. Ireland, 101 N. J. Eq. 818, 138 Atl. 898 (1927); New Jersey Nat. Bank & Trust Co. v. Savemore Realty Co., 107 N. J. Eq. 478, 153 Atl. 480 (1931); Hecht v. Hoogmoed, 111 N. J. Eq. 331, 162 Atl. 873 (1932); United Bldg. & Loan Assn. v. Neuman, 113 N. J. Eq. 244, 166 Atl. 537 (1933); Kotler v. John Hancock Mutual Life Ins. Co., 113 N. J. Eq. 544, 168 Atl. 36 (1933); Marneil Realty Corp. v. Twin Brook Realty Corp., 119 N. J. Eq. 205, 181 Atl. 882 (1935); Karel v. Davis, 122 N. J. Eq. 526, 194 Atl. 545 (1937); Jones v. Page, 26 N. Mex. 440, 194 Pac. 883 (1920); Park v. Musgrave, 2 Thomp. & Cook, 571 (N. Y., 1874); Loma Holding Corp. v. Cripple Bush Realty Corp., 147 Misc. 655. 265 N. Y. S. 125 (1933); Kuhn v. Cermac Realty Co., 148 Misc. 324, 265 N. Y. S. 861 (1933); Farmers & Mechanics Sav. Bk. v. Eagle Bldg. Co., 151 Misc. 249, 271 N. Y. S. 306, (1934); Balick v. Prudential Ins. Co., 202 N. C. 789, 164 S. E. 335 (1932); State v. Wilson, 124 Okla. 236, 254 Pac. 968 (1927); Fiolle v. First Nat. Bank, 173 Okla. 501, 49 P. (2d) 145 (1935); Barnard v. First Nat. Bk., 176 Okla. 326, 55 P. (2d) 972 (1936); University of Tulsa v. Moores, 177 Okla. 548, 61 P. (2d) 25 (1936); Armstrong County Tr. Co. v. Boozer, 216 Pa. 242, 65 Atl. 669 (1907); Lyle v. Armstrong, 235 Pa. 224, 83 Atl. 577 (1919); Fenton v. Joki, 294 Pa. 309, 144 Atl. 136 (1928); Plummer v. Wilson, 322 Pa. 118, 185 Atl. 311 (1936); Ortoleva v. Dijeser, — R. I. —, 191 Atl. 505 (1937); *Ex parte* Cooley, 69 S. C. 143, 48 S. E. 92 (1904); *In re* Wallace, 179 S. C. 480, 184 S. E. 849 (1936); Equitable Life Assur. Society v. Lickness, 63 S. Dak. 618, 262 N. W. 206 (1935); Floore v. Morgan, 175 S. W. 737 (1915 Tex. Civ. App.); Chausse v. Bank of Garland, 71 Utah 586, 268 Pac. 781 (1928); Muller v. Bayle, 21 Grat. 521 (1871, Va.); Muller v. Stone, 84 Va. 398, 6 S. E. 223 (1888); Williams v. Jones, 165 Va. 398, 182 S. E. 280 (1935); Keyser v. Federal Land Bank of Baltimore, 169 Va. 368, 193 S. E. 489 (1937); Caperton v. Land Craft, 3 W. Va. 540 (1869); Mechan v. Blodgett, 86 Wis. 511, 57 N. W. 291 (1893); High on Injunctions, 4th Ed., Sec. 454; Pomeroy's Eq. Juris., 4th Ed., Vol. 4, Sec. 1738; 19 R. C. L. 617; 41 C. J. 930.

market for such stocks happens to be unfavorable, in the absence of any averment of defendant's insolvency.[15]

If the terms of the contract have been followed in making the sale the interference on the part of a court of equity merely because the property would likely sell for a great deal more at some later date would have the effect of impairing the obligations of contracts and extend the guardianship of the court to those laboring under no disability to contract for themselves. Moreover, it is quite possible that by such an interference to prevent hardship to the debtor, one equally as great might be brought upon the creditor who might also be the debtor of a third person and thereby suffer even a greater disaster by failure to collect the money due him.[16]

Unless some additional ground for the injunction could be shown, other than a greatly depressed market, such as fraud or unfair dealings, according to *Lipscomb* v. *New York Life Ins. Co.*[17] "the legal title to the premises passed to the grantee, and unless misfortune alone can be made a substantial and independent source of equity jurisdiction, to be exercised in behalf of one who does not even offer to do equity (either because he is unable or unwilling to do it) the plaintiffs have not a foot to stand upon in a court of equity. However strongly our sympathies may be enlisted for the unfortunate victim of hard times, they cannot furnish a basis for equity jurisdiction, and such courts cannot and ought not to be made the instruments of speculation in the future values of property even for the benefit of the unfortunate."[18]

A court of equity will, nevertheless, enjoin the execution of a power of sale in a mortgage, when it appears that the mortgagee is proceeding in an improper or oppressive manner or is perverting the power from its legitimate purpose. And in a suit for cancellation or redemption of a mortgage, a motion for a temporary injunction restraining the exercise of a power of sale may be granted, when it appears that less inconvenience and

[15] Park v. Musgraves (1874). 2 Thomp. & Cook (N. Y.) 571; High on Injunctions, 4th Ed., Sec. 454.

[16] Anderson v. White (1894), 2 App. D. C. 408.

[17] 138 Mo. 17, 24, 39 S. W. 465, 466 (1897).

[18] Followed in Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125.

injustice will thereby be caused to the defendant than would result to the complainant from refusing the motion.[19]

Perhaps no court is wise enough to declare with absolute finality that no economic or financial stringency or distress could warrant equitable restraint of the power of sale in instruments securing debts, but certainly the mere allegation of a general depression before a sale at an unconscionable purchase price has not heretofore been deemed adequate to invoke equitable relief.[20]

No court can fail, however, to take judicial notice of the financial depression which has existed in recent years. Loans made a few years ago on the basis of the then going values cannot possibly be replaced on the basis of present values for it is a matter of common knowledge that within these few years values have shrunk enormously.[21]

Though the court judicially knows that there is a world wide economic stagnation in all markets and it likewise judicially knows that loans are not being made through agencies where formerly they were to be had, and even though there may be no lending agencies to replace them, there exists nevertheless a line over which a court of equity should not pass no matter how much it is tempted, least it trespass upon the jurisdiction reserved for the legislative branch of the government.[22]

The Constitution of the United States draws sharp demarcation lines between the functions of the co-ordinate branches of the government. No conscientious court could "for a moment think of usurping the power of the legislature to declare a moratorium upon the ground that an emergency exists." If the legislature is silent it amounts to a command to courts of equity and law not to interfere with the obligations of contract.[23]

[19] Ewing v. Bay Minette Land Co. (1936), 232 Ala. 22, 166 So. 409; Ballenger v. Price (1929), 219 Ala. 412, 122 So. 628; Caldwell v. Caldwell (1910), 166 Ala. 406, 52 So. 323; Glover v. Hembree (1884), 82 Ala. 324, 8 So. 251; Warner v. Jacob (1882), 20 Ch. D. (Eng.) 220; Pomeroy's Equity Jur., 4th Ed. Vol. 4, Sec. 1738; 19 R. C. L. 617.

[20] Bolich v. Prudential Ins. Co. (1932), 202 N. C. 789, 164 S. E. 335.

[21] Teachers Retirement Fund Assn. v. Pirie (1935), 150 Ore. 435, 46 P. (2d) 105; Kuhn v. Cermac Realty Co. (1933), 148 Misc. (N. Y.) 324, 265 N. Y. S. 861.

[22] Kuhn v. Cermac Realty Co. (1933), 148 Misc. (N. Y.) 324, 265 N. Y. S. 861.

[23] Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125; Kuhn v. Cermac Realty Co. (1933), 148 Misc. (N. Y.) 324, 265 N. Y. S. 861.

Acting in anticipation, however, of legislative relief a New York court restrained a sale until reasonable assurance of normal competitive bidding, upon condition that the mortgagor or owner not prove recalcitrant in aiding or abiding by whatever plan a majority of those interested in the *res* might adopt as best available. In *Bank of Manhattan Trust Co.* v. *Ellda Corp.*[24] the Chancellor said: "We are not unmindful of the rights of a mortgagee, nor are we forgetful of the plight of the owner in these unbelievable hours of darkness. In ordinary circumstances no tolerance would be given to a plea delaying the mortgagee's right to foreclose and sell. * * * Impressed with the distress of property owners and *confident of its power to anticipate legislative relief* this court of equity experiences no qualms and has no hesitancy in making the direction under discussion." (Italics mine.)

Other cases following somewhat the same line of reasoning as in the case of *Bank of Manhattan Trust Co.* v. *Ellda Corp.*[25] have held that, where the legislature has already declared that an emergency exists and fixed the period thereof, setting forth certain remedies available to mortgagees, courts of equity are not bound by the limitations of such legislative acts. These enactments provide procedure and relief which are cognate to the historic exercise of equitable jurisdiction. Equity will not, accordingly, be circumscribed by the statutory dates if the emergency in fact had an earlier origin or a later termination. Such legislative enactments do not deprive a court of equity of its inherent power to place limitations upon the remedies available to a mortgagee in consonance with fundamental doctrines of equity.[26]

A court of equity may, therefore, according to this line of decisions, give equitable relief during such times as it deems within the period of economic stress and emergency, which period may be equal to or greater than that fixed by the legislature.

But quite independently of statute or rule of court, a court of chancery has inherent power to order a sale of mortgaged

[24] 147 Misc. (N. Y.) 374, 383, 265 N. Y. S. 115, 124 (1933).

[25] *Supra.* Note 24.

[26] Monaghan v. May (1934), 242 App. Div. (N. Y.) 64, 273 N. Y. S. 475; Clinton Trust Co. v. 142-144 Joralemon St. Corp. (1933), 237 App. Div. (N. Y.) 789, 263 N. Y. S. 359; Ulivarri v. Lovelace (1934), 39 N. Mex. 36, 38 P. (2d) 1114.

property and to control its process directed to that end.[27] In like manner equity has the inherent power to assume jurisdiction in suits for foreclosure of mortgages, to fix the time and terms of sale, and to refuse to confirm sales upon equitable grounds where they are found to be unfair.[28]

This does not mean, however, that the court, without statutory decision, may withhold a decree which is required to be granted in conformity with the contract and the statutory law governing foreclosure. In a cause of this sort a court of chancery may not withhold from the mortgagee the degree of foreclosure which is warranted under the law and facts merely because of adverse conditions and the resultant misfortunes to the mortgagor.[29]

If the Chancellor has the right and power to disregard clear legal mandates or prohibit the enforcement of a right merely when, in his judgment, justice is threatened, the trend would be to greatly limit, if not entirely destroy, all dealings based upon contract. No one would feel safe in loaning money upon the solemn obligation of the borrower to repay it in accordance with the terms of the loan; and the enforcement of this so-called equitable doctrine would return to the people as a plague, demoralizing all industrial and economic transactions based upon obligations to perform, and result in untold hardships and deprivations to a great mass of individuals. It would in one stroke convert a government of law to one of men, because it would be entirely within the power of the equity court to determine whether or not an emergency did, in fact, exist and whether or not injustice would be done by enforcing the settled principles and rules of law. It would result in different rules applicable to one individual from another, and under similar circumstances,

[27] Teachers Retirement Fund Assn. v. Pirie (1935), 150 Ore. 435, 46 P. (2d) 105; Federal Title & Mortgage Guaranty Co. v. Lowenstein (1933), 113 N. J. Eq. 200, 166 Atl. 538; Jones on Mortgages, 8th Ed., Vol. 3, Sec. 2012.

[28] Williams v. Jones (1935), 165 Va. 398, 182 S. E. 280; Marneil Realty Corp. v. Twin Brook Realty Co. (1935), 119 N. J. Eq. 205, 181 Atl. 882; Monaghan v. May (1934), 242 App. Div. (N. Y.) 64, 273 N. Y. S. 475; Clinton Trust Co. v. 142-144 Joralemon St. Corp. (1933), 237 App. Div. 789, 263 N. Y. S. 359; Bolich v. Prudential Ins. Co. (1932), 202 N. C. 789, 164 S. E. 335.

[29] Haywood v. Rigsbee (1935), 207 N. C. 695, 178 S. E. 108; Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125.

dependent only upon as little as the whim or caprice of the judge before whom the case is heard.[30]

A court of equity has no jurisdiction to enforce a contract void at law for want of power to make it, or in the absence of fraud, accident, or mistake to so modify a contract so as to make it legal and then enforce it. Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law. They are bound by the positive provisions of statutes and of the Constitution equally with courts of law, and where the transaction or the contract is declared void because not in compliance with express statutory and constitutional provisions, a court of equity cannot interpose to give validity to such transaction or contract or any part thereof. Where the rights of the parties are clearly defined and established by law, equity has no power to change or disturb those rights, but in all such instances the maxim *equitas sequitur legem* is strictly applicable, for where a rule either of statute or common law is direct and governs the case in all its circumstances on the particular point, a court of equity may no more depart from it than a court of law.[31]

If the contract of mortgage is by its terms legal and equitable, the enforcement of such terms irrespective of what may be the motive of the prosecutor of the action is entirely lawful and therefore in a legal sense equitable.[32]

Conceding that equity will enjoin an attempt to pervert a power of sale from its legitimate purpose, yet it must have substantial reasons for so doing.[33] The interests of society

[30] Kenley v. Huntington Bldg. & Loan Assn., Inc. (1934), 166 Md. 182, 170 Atl. 526.

[31] Magniac v. Thomson, 15 How. (56 U. S.) 281 (1853); Hedges v. Dickson County, 150 U. S. 182, 14 Sup. Ct. 71 (1893); Brennan v. American Tr. Co., 3 Calif. (2d) 653, 45 P. (2d) 207 (1935); Baumgarten v. Haas, 68 Md. 32, 11 Atl. 588 (1887); Kenley v. Huntington Bldg. Assn., Inc., 166 Md. 183, 170 Atl. 526 (1934); Davis v. Flagg, 35 N. J. Eq. 491 (1882); South Jersey Title & Finance Co. v. Ireland, 101 N. J. Eq. 818, 138 Atl. 898 (1927); Marneil Realty Corp. v. Twin Brook Realty Corp., 119 N. J. Eq. 205, 181 Atl. 82 (1935); Cameron-Hawn Realty Co. v. Albany, 207 N. Y. 377, 101 N. E. 162 (1913); Loma Holding Corp. v. Cripple Bush Realty Corp., 147 Misc. 655, 265 N. Y. S. 125 (1933); Doggett Lumber Co. v. Conrades, 195 N. C. 626, 143 S. E. 138 (1928); First Nat. Bk. of Henderson v. Purvis, 201 N. C. 753, 161 S. E. 386 (1931); Story Eq. Jur., Vol. 1, Sec. 64; 10 R. C. L. 382; Pomeroy Eq. Jur., 4th Ed., Vol. 1, Secs. 53, 54.

[32] South Jersey Title & Finance Co. v. Ireland (1927), 101 N. J. Eq. 818, 138 Atl. 898.

[33] See Note 19, page 372, *supra*.

require that the power be not interfered with lightly, as it results from a contract between the parties, and the party who borrows must consider when he bargains whether he is not giving too large a power to him with whom he is dealing. Accordingly, jurisdiction will be exercised when, and only when, because of fraud, or want of legality of consideration, or other cogent and sufficient reasons, the enforcement of the collection is against good conscience, or that particular circumstances, intrinsic to the instrument, would render its enforcement in this manner inequitable and work great and irreparable injury.[34]

Mere allegations to the effect that the time is unpropitious for a sale, and that because of the existence of a great financial

[34] Bank of Metropolis v. Guttschlick, 14 Pet. (39 U. S.) 19 (1840); Anderson v. White. 2 App. (D. C.) 408 (1894); Lipschultz v. Phillips, 51 App. (D. C.) 20, 273 Fed. 748 (1921); George v. Forest Glenn Land Co., 52 App. (D. C.) 73, 281 Fed. 577 (1922); McCalley v. Otey, 90 Ala. 302, 8 So. 157 (1890); Sidney Land, etc., Co. v. Milner, etc., Lumber Co., 138 Ala. 185, 35 So. 48 (1903); Hoop v. First Nat. Bk. of Reform, 206 Ala. 321, 89 So. 466 (1921); Culberhouse v. Hawthorne, 107 Ark. 462, 156 S. W. 421 (1913); Moore v. Calkins, 85 Calif. 177, 24 Pac. 729 (1890); Denver Transit, etc. Co. v. Bartle, 69 Colo. 570, 196 Pac. 860 (1921); Washington Tr. Co. v. Pittsburgh-Bartow Min. Mfg. Co., 136 Ga. 180, 71 S. E. 125 (1911); Tooke v. Newman, 75 Ill. 215 (1874); Boyd v. Ellis, 11 With (Ia.) 97 (1860); Philips v. Adams Co., 52 La. Ann. 442, 27 So. 65 (1899); Gato v. Christian, 112 Me. 427, 92 Atl. 489 (1914); Thrift v. Bannon, 111 Md. 303, 73 Atl. 660 (1909); Doxen v. Wagner, 142 Md. 441, 121 Atl. 254 (1923); Macombs v. Elmes, 197 Mass. 19, 83 N. E. 306 (1907); American House Hotel Co. v. Hemmingway, 237 Mass. 180, 129 N. E. 371 (1921); Case v. O'Brien, 66 Mich. 289, 33 N. W. 405 (1887); Moss v. Keary, 231 Mich. 295, 204 N. W. 93 (1925); Michigan Tr. Co. v. Cody, 264 Mich. 258, 249 N. W. 844 (1933); Virginia Joint Stock Land Bk. v. Hudson, 266 Mich. 644, 254 N. W. 234 (1934); Calavaras Timber Co. v. Michigan Tr. Co., 278 Mich. 445, 270 N. W. 743 (1936); Armstrong v. Sanford, 7 Minn. 49 (1862); Montgomery v. McEwen, 9 Minn. 103, (1864); Moller v. Robertson, 146 Minn. 265, 178 N. W. 590 (1920); Stewart v. Belt, 19 So. 957 (1896 Miss.); Ramoneda v. Loggins, 39 So. 1007 (1906 Miss.); Foster v. Reynolds, 38 Mo. 553 (1866); Price v. Empire Loan Assn., 75 Mo. A. 551 (1898); Dey v. Dey, 23 N. J. Eq. 88 (1872); Whitaker v. Hill, 96 N. C. 2, 1 S. E. 639 (1887); Eureka Lumber Co. v. Satchwell, 148 N. C. 316, 62 S. E. 310 (1908); Corey v. Hooker, 171 N. C. 229, 88 S. E. 236 (1916); Guthrie v. Moore, 182 N. C. 24, 108 S. E. 334 (1921); Leak v. Armfield, 187 N. C. 625, 122 S. E. 393 (1924); Beiseker v. Svendsgaard, 28 N. D. 366, 149 N. W. 352 (1914); Bonin v. Macktaz, — R. I. —, 129 Atl. 338 (1925); Holland v. Citizens Sav. Bk., 16 R. I. 734, 19 Atl. 654 (1890); Chapman v. Younger. 32 S. C. 295, 10 S. E. 1077 (1890); Grant County v. Colonial & U. S. Mortgage Co., 3 S. D. 390, 53 N. W. 746 (1892); Keith v. Harbison, 52 S. W. 1109 (1899 Tenn. Ch. App.); Corbitt v. Sweeney, 151 S. W. 858 (1912 Tex. Civ. App.); Floor v. Morgan, 175 S. W. 737 (1915 Tex. Civ. App.); Powell v. Woodbury, 85 Vt. 504, 83 Atl. 541 (1912); Vought v. Rider, 83 Va. 659, 3 S. E. 293 (1887); Le Grand v. Rixey, 83 Va. 862, 3 S. E. 864 (1887); Brown v. Click, 65 W. Va. 459, 64 S. E. 613 (1909); 19 R. C. L. 617, Sec. 434; 41 C. J. 930.

depression the property will not bring anything near its true value and could likely be sold for a better price later, present no grounds for the interposition of equity jurisdiction by injunction predicated upon the principle that such a sale will work a great or irreparable loss and injury to the debtor.[35] Nor does the fact that a prevailing economic depression renders payment of the loan impossible constitute a defence of "impossibility of performance."[36]

The probability, then, that conditions will considerably improve and that the mortgagor, therefore, will be able in the near future to discharge his indebtedness without embarrassment does not merit the interference of equity, if for no other reason than because it is too vague and indefinite to be capable of enforcement.[37] The mortgagor enters into the contract, agreeing as evidence of his good faith and intention to pay the debt, and that if the debt is not paid at maturity the mortgagee shall have the right to enforce the pledge and to have the property sold to pay the debt or so much thereof as the pledged property will produce; and some courts have gone so far as to hold that before a mortgagor can have affirmative equitable relief, such as an injunction to prevent the exercise of the power of sale by the grantee in such mortgage, he must first pay or tender payment to the mortgagee of the principle and lawful interest legally due to him.[38]

Though it be conceded that under the present market conditions, property sold under a foreclosure sale would in all probability bring a price so grossly inadequate as to shock the conscience of the Chancellor and would accordingly create a

[35] Haywood v. Rigsbee (1935), 207 N. C. 695, 178 S. E. 108; American House Hotel Co. v. Hemingway (1921), 237 Mass. 180, 123 N. E. 371; Lipscomb v. New York Life Ins. Co. (1897). 138 Mo. 17, 39 S. W. 465; Case v. O'Brien (1887), 66 Mich. 289, 33 N. W. 405; Montgomery v. McEwen (1864), 9 Minn. 103; Shonk v. Knight (1878), 12 W. Va. 667; Anchor Stove Works v. Gray (1876), 9 W. Va. 469; see also note 14, *supra*.

[36] California Securities Co. v. Grosse (1935), 3 Cal. (2d) 732, 46 P. (2d) 170.

[37] Stanton v. Mortgage Guarantee Co. (1934), 179 Ga. 867, 177 S. E. 566; Deprisco v. Rykaczewski (1931), 18 Del. Ch. 212, 157 Atl. 209.

[38] Marneil Realty Corp. v. Twin Brook Realty Corp. (1935), 119 N. J. Eq. 205, 181 Atl. 882; Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125; Stanton v. Mortgage Guarantee Co. (1934), 179 Ga. 867, 177 S. E. 556; Liles v. Bank (1921), 151 Ga. 483, 107 S. E. 490; Cameron-Hawn Realty Co. v. Albany (1913), 207 N. Y. 377, 101 N. E. 162.

presumption of fraud, irregularity or unfairness sufficient to warrant the disaffirmance of the sale, even so the court should not, without cogent reasons, enjoin the sale. If upon such sale the property does, in fact, bring such an unsatisfactory and unconscoinable price, then is the time for the debtor to interpose an objection to the confirmation of the sale, but the court should not anticipate a sale at such an unconscionably inadequate price.[39] It will be assumed, in the absence of positive averments to the contrary, that the mortgagee intends to offer the property for sale in such a manner that it will not be unwarrantedly sacrified.[40]

Upon proper application a court of equity will refuse to confirm and will set aside a sale made by its officers when conducted contrary to principles of law. The power of the court to so interfere cannot be denied; but to justify the interference, there must be a foundation laid—either fraud or mistake or accident must be averred, by which the rights of the parties have been affected.[41]

On motion to confirm a sale the court should carefully examine the proceedings, and if they are in conformity with the statutes in such cases, and provided there are no other conditions, should ordinarily confirm the sale. All the authorities hold uniformly, however, that gross inadequacy of consideration coupled with additional circumstances is sufficient reason for refusing confirmation.[42]

Some jurisdictions hold that mere inadequacy of price, however gross, is not sufficient ground to justify the Chancellor in refusing to confirm a sale legally made in the absence of additional extenuating circumstances.[43] Though if the inadequacy

[39] Equitable Life Assn. v. Lickness (1935), 63 S. Dak. 618, 262 N. W. 206; Fifth Ave. Bank of New York v. Compson (1933), 113 N. J. Eq. 152, 166 Atl. 86; Kotler v. John Hancock Mutual Life Ins. Co. (1933), 113 N. J. Eq. 544, 168 Atl. 36; United Bldg. and Loan Assn. v. Neuman (1933), 113 N. J. Eq. 244, 166 Atl. 537; Ryan v. Wilson (1903), 64 N. J. Eq. 797, 52 Atl. 993, 53 Atl. 1039; Morisse v. Inglis (1890), 46 N. J. Eq. 306, 19 Atl. 16.

[40] Ewing v. Bay Minette Land Co. (1936), 232 Ala. 22, 166 So. 409.

[41] Karel v. Davis (1937), 122 N. J. Eq. 526, 194 Atl. 545.

[42] Fiolle v. First Nat. Bank (1935), 173 Okla. 501, 49 P. (2d) 145.

[43] Wells v. Lenox, 108 Ark. 366, 159 S. W. 1099 (1912); Hawkins v. Wood, 179 Ark. 845, 18 S. W. (2d) 371 (1929); Federal Land Bank of St. Louis v. Floyd, 187 Ark. 616, 61 S. W. (2d) 449 (1933); Rauer v. Hertweck, 175 Calif. 278, 165 Pac. 946 (1917); Bock v. Losekamp, 179 Calif. 674, 179 Pac. 516 (1919); Jones v. Sierra Verdugo Warer Co., 63 Cal. App. 254, 218 Pac. 454 (1923); Bechtel v. Clemons, 12 Calif.

of price is gross, the Chancellor will invariably seize upon other circumstances tending to impeach the fairness of the transaction as a cause for vacating the sale, and where the inadequacy is so great and appalling as to shock the conscience of the Chancellor, only the slightest of circumstances, insufficient in themselves to warrant intervention, but which tend to infer unfairness in the conduct of the sale, will be considered sufficient to justify the refusal of confirmation.[44] In determining whether to refuse confirmation it ought to be that the more sacrificial the price, the less will be the degree of unfairness required in the other circumstances presented, and, *per contra*, the less the degree of inadequacy of price, the greater the degree of unfairness manifested by the other circumstances.[45] But these circumstances impeaching the fairness of the transaction should relate to the conduct of the officer making the sale or to the conduct of an interested party participating in and being benefited by the

App. (2d) 309, 55 P. (2d) 531 (1936); Hamilton v. Quimby, 46 Ill. 90 (1867); Bock v. Hooper, 318 Ill. 182, 149 N. E. 21 (1925); Logar v. O'Brien, 339 Ill. 628, 171 N. E. 629 (1930); Clegg v. Christensen, 346 Ill. 314, 178 N. E. 925 (1931); Hecht v. Hoogmoed, 111 N. J. Eq. 331, 162 Atl. 873 (1932); State v. Wilson, 124 Okla. 236, 254 Pac. 968 (1927); University of Tulsa v. Moores, 177 Okla. 548, 61 P. (2d) 25 (1936); Fenton v. Joki, 294 Pa. 309, 144 Atl. 136 (1928); Plummer v. Wilson, 322 Pa. 118, 185 Atl. 311 (1936); *In re* Wallace, 179 S. Car. 480, 184 S. E. 849 (1936); Gregg v. First Nat. Bank, 26 S. W. (2d) 179 (1930 Tex. Civ. App.); Hodges v. Commonwealth Bank & Trust Co., 44 S. W. (2d) 400 (1931 Tex. Civ. App.); Cocke v. Southland Life Ins. Co., 75 S. W. (2d) 194 (1934 Tex. Civ. App.); Chausse v. Bank of Garland, 71 Utah 586, 268 Pac. 781 (1928).

[44] Clemons v. Union Trust Co. (1936), 170 Md. 520, 185 Atl. 462; University of Tulsa v. Moores (1936), 177 Okla. 548, 61 P. (2d) 25; Melton v. Tipton (1936), 264 Ky. 196, 94 S. W. (2d) 350; Hecht v. Hoogmoed (1932), 111 N. J. Eq. 331, 162 Atl. 873; *In re* Wallace (1936), 179 S. Car. 480, 184 S. E. 849; Federal Land Bank of St. Louis v. Floyd (1933), 187 Ark. 616, 61 S. W. (2d) 449; Henderson v. Henderson (1936), 266 Ky. 319, 98 S. W. (2d) 904; Kentucky Joint Land Bank v. Fitzpatrick (1931), 237 Ky. 624, 36 S. W. (2d) 25; Roberson v. Matthews (1931), 200 N. C. 241, 156 S. E. 496; Clegg v. Christensen (1931), 346 Ill. 314, 178 N. E. 925; Logar v. O'Brien (1930), 339 Ill. 628, 171 N. E. 629; Federal Land Bank v. Curts (1927), 45 Idaho 414, 262 Pac. 877; Rospigliosi v. New Orleans M. & C. R. Co. (1916), 237 Fed. 341; Smith v. Holowell (1923), 201 Ky. 271, 256 S. W. 408; Durham v. Elliott (1918), 180 Ky. 724, 203 S. W. 539; Fenton v. Joki (1928), 294 Pa. 309, 144 Atl. 136; Lefever v. Kline (1928), 294 Pa. 22, 143 Atl. 488; Block v. Hooper (1925), 318 Ill. 182, 149 N. E. 21; State v. Wilson (1927), 124 Okla. 236, 254 Pac. 968; Weir v. Weir (1928), 196 N. C. 268, 145 S. E. 281; Union & Planters Bank & Tr. Co. v. Pope (1928), 176 Ark. 1023, 5 S. W. (2d) 330; Schroeder v. Young (1896), 161 U. S. 334, 16 Sup. Ct. 512; Graffan v. Burgess (1886), 117 U. S. 180, 6 Sup. Ct. 686.

[45] Louisville Title Co. v. Ramsey (1935), 258 Ky. 183, 79 S. W. (2d) 693.

sale. A sale will not be set aside for causes that the parties in interest might, with a reasonable degree of diligence have obviated.[46]

Where the inadequacy is gross the purchaser at a judgment sale can retain his advantage only by showing that he acquired title by proceedings free from fraud or irregularity. In such a case irregularity does not necessarily mean that there was unfairness or fraud. If the sale were attended by mistake, surprise, misapprehension or accident as a result of which the complaining party was prevented from attending the sale and protecting his interest, the Chancellor will ordinarily refuse to confirm such a sale, provided that the inadequacy can in some way be traced to, or connected with, or is a result of such mistake, surprise, misapprehension or accident.[47]

There is a wide variance in the opinions of the courts as to the duty and responsibility vested in an officer conducting a judicial sale.

It has been held that it is the duty of a sheriff at a julicial sale to secure the best possible price for property being sold. In the event that he is confronted with only one bid and that bid is so grossly inadequate as to shock the conscience of a fair and

[46] *In re* Wallace (1936), 179 S. C. 480, 184 S. E. 849; Certain Lands v. Coronado Beach (1937), 128 Fla. 884, 175 So. 774; Kentucky Joint Land Bank v. Fitzpatrick (1931), 237 Ky. 624, 36 S. W. (2d) 25; Henderson v. Henderson (1936), 266 Ky. 319, 98 S. W. (2d) 904; Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125; Clemens v. Union Tr. Co. (1936), 170 Md. 520, 185 Atl. 462; Stallings v. Annapolis Sav. Inst. (1934), 167 Md. 4, 172 Atl. 283; Rospigliosi v. New Orleans M. & C. R. Co. (1916), 237 Fed. 341; Block v. Hooper (1925), 318 Ill. 182, 149 N. E. 21; Smith v. Holowell (1923), 201 Ky. 271, 256 S. W. 408; Jones v. Sierra Verdugo Water Co. (1923), 63 Cal. App. 254, 218 Pac. 454; Evans Marble v. Abrams (1917), 131 Md. 204, 101 Atl. 964; Lefever v. Kline (1928), 294 Pa. 22, 143 Atl. 488; Griswold v. Barden (1911), 146 Wis. 35, 130 N. W. 952; Thomas v. Fewster (1902), 95 Md. 446, 52 Atl. 750; Graffan v. Burgess (1886), 117 U. S. 180, 6 Sup. Ct. 686; Stewart v. Devries (1895), 81 Md. 525, 32 Atl. 285; Meehan v. Blodgett (1893), 86 Wis. 511, 57 N. W. 291.

[47] Hecht v. Hoogmoed (1932), 111 N. J. Eq. 331, 162 Atl. 873; Henderson v. Henderson (1936), 266 Ky. 319, 98 S. W. (2d) 904; Certain Lands v. Coronado Beach (1937), 128 Fla. 884, 175 So. 774; Block v. Hooper (1925), 318 Ill. 182, 149 N. E. 21; Smith v. Holowell (1923), 201 Ky. 271, 256 S. W. 408; Stortz v. Voss (1918), 181 Ky. 546, 205 S. W. 610; Greer v. McAninch (1928), 226 Ky. 644, 11 S. W. (2d) 696; Frensley v. American Nat. Bk. (1927), 129 Okla. 164, 264 Pac. 188; Wheeler & Motter Merc. v. Wright (1917), 64 Okla. 97, 166 Pac. 184; Union & Planters Bk. & Tr. Co. v. Pope (1928), 176 Ark. 1023, 5 S. W. (2d) 330; Moore v. McJudkins (1918), 136 Ark. 292, 206 S. W. 445; Chapin v. Quisenberry (1919), 138 Ark. 68, 210 S. W. 341; Wofford v. Young (1927), 173 Ark. 802, 293 S. W. 725.

honest man, it is his duty under the circumstances to postpone the sale and report to the court that the property has not been sold for want of bidders. If property sold under such conditions brings an inadequate price, the failure of the sheriff to so act may result in the necessary additional circumstances required to cause the court to refuse confirmation of the sale.[48]

On the other hand, however, it has been held that it cannot be assumed that the sheriff is advised as to the actual value of the property which he is selling. He simply carries out the mandate of the court contained in the general or special execution which the clerk delivered to him. It is not his duty to examine the property. He may or may not have seen the property, but it cannot be expected that he has formed any opinion as to the value thereof. The question of the adequacy of price bid should be presented to the court at or before the time an order confirming the sale is asked for.[49]

Where a sale is not tainted with fraud, mistake or misconduct which works an injustice to the party complaining, and inadequacy of price is the sole reliance for the objection to confirmation, the controlling rule in determining whether or not the sale should be confirmed is quite different from the rule to be applied where these elements are present.[50]

Inadequacy of price is a highly important objection to the confirmation of a sale, but the rule is well settled that a judicial sale regularly made in a manner prescribed by law, upon due notice, and without apparent fraud, unfairness, surprise or mistake, will not generally be set aside or refused confirmation on account of mere inadequacy of price, however great, unless the inadequacy is so gross and inordinate as to shock the conscience of the Chancellor and create the presumption of fraud, unfairness or mistake.[51] Indeed it has been held that inade-

[48] Dunn v. Ponceler (1937), 235 Ala. 269, 178 So. 40; Federal Land Bank v. Curts (1927), 45 Idaho 414, 262 Pac. 877.

[49] Betz v. Tower Savings Bank (1936), 185 Wash. 314, 55 P. (2d) 338.

[50] Keyser v. Federal Land Bank of Baltimore (1937), 169 Va. 368, 193 S. E. 489.

[51] Clark v. Freedman's Sav. & Tr. Co., 100 U. S. 149 (1879); Pewabic Mining Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887 (1892); Ballentyne v. Smithe, 205 U. S. 285, 27 Sup. Ct. 527 (1907); Rospigliosi v. New Orleans M. & C. R. Co., 237 Fed. 341 (1916); Speers Sand & Clay Works v. American Tr. Co., 52 F. (2d) 831 (1931); Bethlehem Steel Co. v. Inter. Com. Eng. Corp., 66 F. (2d) 409 (1933); Equitable Life Assur. Soc. v. Vaughn, 82 F. (2d) 978 (1936); United States Nat. Bk. v. Pamp, 83 F. (2d) 493 (1936); Guaranty Tr. Co. v. Williamsport Wire Rope

quacy of price will not sustain disaffirmance unless it be so manifestly gross as to strike the mind with amazement.[52] And even then the party seeking to have the sale disapproved for gross inadequacy of price should, generally speaking, guaranty an advance bid in case of a resale, or give security that there will be no loss.[53]

The question next arises as to just how grossly inadequate, in fact, the price realized must be, in order to successfully create a presumption of fraud or irregularity in the sale. It has been held that property selling for from less than 5% up to 34% of its appraised value is so low and shocking to the Court as to be irreconcilable with the true worth of the property.[54]

Co., 20 F. Supp. 634 (1937); Dunn v. Ponceler, 235 Ala. 269, 178 So. 40 (1937); Gleason v. Boone, 123 Ark. 523, 185 S. W. 1093 (1916); Horn v. Hull, 169 Ark. 463, 275 S. W. 905 (1925); Royal v. McVay, 180 Ark. 973, 23 S. W. (2d) 983 (1930); *In re* Downham, 5 W. W. Harr. (35 Del.) 295, 165 Atl. 152 (1932); Kontz v. Citizens & Sou. Nat. Bk., 181 Ga. 70, 181 S. E. 764 (1935); Illinois Joint Stock Land Bk. v. Conard, 288 Ill. App. 475, 6 N. E. (2d) 232 (1937); Glenn v. Miller, 186 Ia. 1187, 173 N. W. 135 (1919); Rohrs v. McGlasson, 250 Ky. 140, 61 S. W. (2d) 1087 (1933); Louisville Title Co. v. Ramsey, 258 Ky. 183, 79 S. W. (2d) 693; Fidelity & Columbia Tr. Co. v. White Const. Co., 258 Ky. 475, 80 S. W. (2d) 550 (1935); Aulenbrock v. Blakemore, 262 Ky. 157, 89 S. W. (2d) 635 (1935); Melton v. Tipton, 264 Ky. 196, 94 S. W. (2d) 350 (1936); Henderson v. Henderson, 266 Ky. 319, 94 S. W. (2d) 904; Evans Marble v. Abrams, 131 Md. 204, 101 Atl. 964; Clemens v. Union Trust Co., 170 Md. 520, 185 Atl. 462 (1936); Stallings v. Annapolis Sav. Inst., 167 Md. 4, 172 Atl. 283 (1934); Northland Pine Co. v. Northland Insulating Co., 145 Minn. 395, 177 N. W. 635 (1920); First Nat. Bk. v. Hunt, 101 Nebr. 743, 165 N. W. 139 (1917); Metropolitan Life Ins. Co. v. Heany, 122 Nebr. 747, 241 N. W. 525 (1932); Federal Land Bank v. Radke, 122 Nebr. 834, 241 N. W. 752 (1932); E. H. Loughee, Inc. v. Matters, 124 Nebr. 242, 246 N. W. 242 (1933); Physicians Casualty Assn. v. Brownfield, 133 Nebr. 906, 277 N. W. 599 (1938); Guaranty Tr. Co. v. Fitzgerald Hotel & Develop. Corp., 97 N. J. Eq. 277, 127 Atl. 672 (1925); New Jersey Nat. Bk. & Tr. Co. v. Savemore Realty Co., 107 N. J. Eq. 478, 152 Atl. 480 (1931); Karel v. Davis, 122 N. J. Eq. 526, 194 Atl. 545 (1937); Las Vegas Ry. & P. Co. v. Trust Co., 15 N. Mex. 634, 110 Pac. 856 (1910); Chem. Bk. & Tr. Co. v. Adam-Schumann Assn., Inc., 150 Misc. 221, 268 N. Y. S. 674 (1934); State v. Harrower 167 Okla. 269, 29 P. (2d) 123 (1934); Fiolle v. First Nat. Bk., 173 Okla. 501, 49 P. (2d) 145 (1935); Keyser v. Federal Land Bank, 169 Va. 368, 193 S. E. 489 (1937); 16 R. C. L. 95.

[52] Equitable Life Assur. Soc. v. Vaughn (1936), 82 F. (2d) 978.

[53] Illinois Joint Stock Land Bk. v. Conard (1937), 288 Ill. App. 475, 6 N. E. (2d) 232; Schulz v. Hasse (1907), 227 Ill. 156, 81 N. E. 50.

[54] University of Tulsa v. Moores (1936), 177 Okla. 548, 61 P. (2d) 25; State v. Harrower (1934), 167 Okla. 269, 29 P. (2d) 123; Fiolle v. First Nat. Bk. (1935), 173 Okla. 501, 49 P. (2d) 145; Citizens State Bk. v. McRoberts (1925), 29 Ariz. 173, 239 Pac. 1028; Suring State Bank v. Giese (1933), 210 Wis. 489, 246 N. W. 556; Chem. Bk. & Tr. Co. v. Adam-Schumann Assn. (1934), 150 Misc. (N. Y.) 221, 268 N. Y. S. 674.

On the other hand, property selling for from 33⅓% to 75% of its reasonable value, and a leasehold estate selling for 25% of its appraised value has been held not sufficiently inadequate as to indicate fraud, duress, or oppression, and justify a court in refusing confirmation.[55] In any event the burden of proof rests upon the plaintiff to affirmatively prove that the value of the property is so much greater than the amount realized from the sale that the price so received is, as a matter of fact, grossly inadequate.[56]

Assuming that the price obtained for the property is so wantonly sacrificial of its reasonable value that it admittedly shocks the conscience of the Chancellor and warrants his presumption of fraud, still there remains the question of upon what appraisal the value of the property should be predicated. For all property is continually fluctuating in value, and naturally during a period of economic depression it will be less desirable than in other times.[57] The result of general adverse economic conditions, however, must be assumed to operate on all alike and therefor the mortgagor and the mortgagee must come alike under the hardships incident thereto.[58] The sale price of the property may be grossly inadequate as compared with its appraised value at the time the contract was entered into, and yet it may be entirely adequate if compared with its value as based upon the current market at the time the property is sold. Where the sale of mortgaged property is for a fair and reasonable price at the time of the sale, and where a resale would not result in a higher price, the sale should be confirmed.[59]

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[55] *In re* Yost & Cook (1934), 70 F. (2d) 614; Lemere v. White (1932); 122 Nebr. 676, 241 N. W. 105; Physicians Cas. Assn. v. Brownfield (1938), 133 Nebr. 906, 277 N. W. 599; Rohrs v. McGlasson (1933), 250 Ky. 140, 61 S. W. (2d) 1037; Aulenbrock v. Blakemore (1935), 262 Ky. 157, 89 S. W. (2d) 635; Fenton v. Joki (1928), 294 Pa. 309, 144 Atl. 136.

[56] Royal Highlander v. Louthan (1932), 123 Nebr. 469, 243 N. W. 267; First Nat. Bk. v. Hunt (1917), 101 Nebr. 743, 165 N. W. 139; Blankenship v. Mongini (1928), 105 W. Va. 530, 143 S. E. 301; Bennett v. Ford (1912), 113 Va. 442, 74 S. E. 394.

[57] Barnard v. First Nat. Bk. (1936), 176 Okla. 501, 49 P. (2d) 145.

[58] Marneil Realty Corp. v. Twin Brook Realty Corp. (1935), 119 N. J. Eq. 205, 181 Atl. 882

[59] Standard Lumber & Mfg. Co. v. Deposit Bank & Guar. Tr. Co. (1934), 169 Miss. 120, 152 So. 639; Thomas v. Central Hanover Bank & Tr. Co. (1934), 64 App. (D. C.) 96, 75 F. (2d) 227; Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125; Lipscomb v. New York Life Ins. Co. (1897), 138 Mo. 17, 39 S. W. 465.

The Chancellor must, it is plain to see, strive for some "yardstick"—some measure of values—in order to determine the true worth of the mortgaged or pledged property, and subsequently reach a fair conclusion as to whether or not the sale price is, in fact, grossly inadequate.

The principles by which courts are governed in deciding upon the adequacy of the price realized in private sales are very different from those controlling in public sales. The price paid for property at a private sale is only presumptive evidence of its value, while on the other hand, in the absence of proof to the contrary, the highest competitive bid at an open judicial sale, properly advertised and fairly conducted, is usually accepted by courts as a fair criterion of the value of the property sold. In the one case slight inadequacy and reasonable expectation of a better price is sometimes held sufficient to justify the setting aside of a sale where the approval of the court is necessary or where it is invoked; while in the other, inadequacy must be gross, and the prospect of a better price practically demonstrable or the circumstances such as to indicate the absence of fair competition, in order to warrant the refusal of confirmation. After-stated opinions, affidavits of undervalue, and the like are regarded with little favor, and are entitled to little weight in comparison with the fact established by the auction, and its results. The amount bid, however, whether at a private or public sale is not conclusive of the value, but is a fact which must be weighed with the other evidence in determining whether the purchase price is an adequate one under the existing circumstances of the particular case.[60]

In normal times a sale at public auction will avoid the sacrifice of property at a grossly inadequate sale price. This premise is predicated upon the theory that a thing which cannot be sold has no value, and that it is worth just what a purchaser will

[60] Keyser v. Fed. Land Bank of Baltimore (1937), 169 Va. 368, 193 S. E. 489; Plummer v. Wilson (1936), 322 Pa. 118, 185 Atl. 311; Thomas v. Central Hanover Bk. & Tr. Co. (1934), 64 App. (D. C.) 96, 75 F. (2d) 227; Merchants Nat. Bk. v. Ralphsnyder (1933), 113 W. Va. 480, 169 S. E. 89; Blankenship v. Mongini (1928), 105 W. Va. 530, 143 S. E. 301; Bennett v. Ford (1912), 113 Va. 442, 74 S. E. 394; Weinstein v. Boyd (1920), 136 Md. 227, 110 Atl. 506; Mason v. Hubner (1906), 104 Md. 554, 65 Atl. 367; Nitrophos. Syn. v. Johnson (1902), 100 Va. 774, 42 S. E. 995; South Balto. Co. v. Kirby (1899), 89 Md. 52, 42 Atl. 913; Hazlewood v. Forrer (1897), 94 Va. 703, 27 S. E. 507; Bradford v. McConihay (1879), 15 W. Va. 732; 23 C. J. 57.

pay for it, and no more, and that if the only price offered constitutes but a negligible part of its theretofore assumed value, it nevertheless represents the value of property at the time. During periods of depression, however, the device of a judicial sale sometimes fails in its intended purpose because of the lack of competitive bidding. Moreover, it must be remembered that though at the time of the sale it may be difficult to translate the true value of the property into terms of dollars, yet it may have a great potential or future value which may legitimately be taken into account.[61]

After taking cognizance of all the intricacies and circumstances of a particular proceeding, the decision as to whether the price bid is grossly inadequate or whether there are other grounds upon which confirmation of the sale should be refused is a matter resting within the judgment and discretion of the tribunal ordering the sale; it is to be remembered, however, that this power resting in the Chancellor is not an arbitrary one, but one to be exercised in accordance with established principles of law and equity.[62] And the judgment of the trial court in confirming or rejecting a judicial sale, will not ordinarily be disturbed unless it appears to the appellate court that there has manifestly been an abuse of discretion.[63]

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[61] Suring State Bank v. Giese (1933), 210 Wis. 489, 246 N. W. 556.

[62] Currin v. Nourse (1933), 66 F. (2d) 137; Cocke v. Southland Life Ins. Co. (1934 Tex. Civ. App.), 75 S. W. (2d) 194; Hodges v. Commonwealth Bk. & Tr. Co. (1931 Tex. Civ. App.), 44 S. W. (2d) 400; Gregg v. First Nat. Bk. (1930 Tex. Civ. App.), 26 S. W. (2d) 179; Bovay v. Townsend (1935), 78 F. (2d) 343; Kentucky Joint Land Bk. v. Fitzpatrick (1931), 237 Ky. 624, 36 S. W. (2d) 25; Speers Sand & Clay Works v. American Tr. Co. (1931), 52 F. (2d) 831; Bethlehem Steel Co. v. Inter. Com. Eng. Corp. (1933), 66 F. (2d) 409; Clegg v. Christensen (1931), 346 Ill. 314, 178 N. E. 925; Hawkins v. Wood (1929), 179 Ark. 845, 18 S. W. (2d) 371; Fiolle v. First Nat. Bk. (1935), 173 Okla. 501, 49 P. (2d) 145; Commonwealth Tr. Co. v. Harkins (1933), 312 Pa. 402, 167 Atl. 278; Chicago City Bk. & Tr. Co. v. Johnson (1938), 293 Ill. App. 564, 13 N. E. (2d) 191; Levy v. Broadway-Carmen Bldg. Corp. (1937), 366 Ill. 279, 8 N. E. (2d) 671; Northland Pine Co. v. Northland Ins. Co. (1920), 145 Minn. 395, 177 N. W. 635; Jacobsohn v. Larkey (1917), 245 Fed. 538; Lefever v. Kline (1928), 294 Pa. 22, 143 Atl. 488; Rader v. Bussey (1924), 313 Ill. 226, 145 N. E. 192; Watkins v. Justice (1917), 256 Pa. 37, 100 Atl. 488; Chapin v. Quisenberry (1919), 138 Ark. 68, 210 S. W. 341; Snyder v. Snyder (1914), 244 Pa. 331, 90 Atl. 717; Pewabic Mining Co. v. Mason (1892), 145 U. S. 349, 12 Sup. Ct. 887; Stroup v. Raymond (1897), 183 Penn. 279, 38 Atl. 626; Hart v. Burch (1889), 130 Ill. 426, 22 N. E. 831; Jennings v. Dunphy (1898), 174 Ill. 86, 50 N. E. 1045; 16 R. C. L. 95.

[63] Bovay v. Townsend (1935), 78 F. (2d) 343; Currin v. Nourse (1933), 66 F. (2d) 137; Bethlehem Steel Co. v. Inter. Com. Eng. Corp. (1933), 66 F. (2d) 409; Speers Sand & Clay Wks. v. Amer. Tr. Co.

The court being in fact the vendor may consent or not in its discretion to the sale. Prior to its consent by means of confirmation, the sale by the master or sheriff is not a sale in a legal sense and the accepted bidder acquires no independent right to have his purchase completed but the transaction remains only a preferred proposal until confirmed by the court.[64] After the sale has been fairly made and confirmed, however, and all the parties in interest have had an opportunity to bid on the property at the sale, neither inadequacy of price or offers of better prices, nor anything but actual fraud, accident, mistake, or some other cause for which equity would void a like sale between private parties will warrant the court in voiding the confirmation of the sale or in opening the latter and receiving subsequent bids, for the order confirming the sale is equivalent to an adjudication that the sale was one properly to be approved and creates a presumption of the regularity of the proceedings; nor is the actual receipt of a higher bid sufficient reason for voiding the sale if the bidder had an opportunity to make his bid in the first instance.[65] With this rule in force, the burden is on the appellant to overcome the presumption by a proper showing.[66] It is the purpose of the law that judicial sales should be final.[67]

(1931), 52 F. (2d) 831; Kentucky Joint Land Bk. v. Fitzpatrick (1931), 237 Ky. 624, 36 S. W. (2d) 25; Commonwealth Tr. Co. v. Harkins (1933), 312 Pa. 402, 167 Atl. 278; Ruff v. Guaranty Title & Tr. Co. (1930), 99 Fla. 197, 126 So. 383; Illinois Joint Stock Land Bk. v. Conard (1937), 288 Ill. App. 475, 6 N. E. (2d) 232; Clegg v. Christensen (1931), 346 Ill. 314, 178 N. E. 925; Worden v. Rayburn (1924) 313 Ill. 495, 145 N. E. 101; Mitchell v. Mason (1918), 75 Fla. 679, 79 So. 163; Somerville v. Hill (1918), 260 Pa. 477, 104 Atl. 62; Lefever v. Kline (1928), 294 Pa. 22, 143 Atl. 488; Jacobsohn v. Larkey (1917), 245 Fed. 538; Pewabic Mining Co. v. Mason (1892), 145 U. S. 349, 12 Sup. Ct. 887.

[64] Chicago City Bank & Trust Co. v. Johnson (1938), 293 Ill. App. 564, 13 N. E. (2d) 191; Levy v. Broadway Carmen Bldg. Corp. (1937), 366 Ill. 279, 8 N. E. (2d) 671; Jennings v. Dunphy (1898), 174 Ill. 86, 50 N. E. 1045; Park v. Burch (1889), 130 Ill. 426, 22 N. E. 831.

[65] Chicago City Bank & Tr. Co. v. Johnson (1938), 293 Ill. App. 564, 13 N. E. (2d) 191; Rohrs v. McGlasson (1933), 250 Ky. 140, 61 S. W. (2d) 1087; Brennan v. Amer. Tr. Co. (1935), 3 Calif. (2d) 635, 45 P. (2d) 207; Howells St. Bk. v. Hardes (1934), 126 Nebr. 356, 253 N. W. 410; Hill v. Campbell (1933), 125 Nebr. 585, 251 N. W. 106; Lewis v. Neslund (1934), 128 Nebr. 98, 257 N. W. 666; Ruff v. Gty. Title & Tr. Co. (1930), 99 Fla. 197, 126 So. 383; Mitchell v. Mason (1918), 75 Fla. 679, 79 So. 163; Morrison v. Burnette (1907), 154 Fed. 617; 16 R. C. L. 100.

[66] Ruff v. Gty. Title & Tr. Co. (1930), 99 Fla. 197, 126 So. 383; Mitchell v. Mason (1918), 75 Fla. 679, 79 So. 163.

[67] Rospigliosi v. New Orleans M. & C. R. Co. (1916), 237 Fed. 341; Northland Pine Co. v. Northland Ins. Co. (1920), 145 Minn. 395,

The cogent and all sufficient reason for this rule, is that judicial sales would become farces and rational men would shun them and refuse to bid, if after the confirmation unsuccessful bidders or dissatisfied litigants could avoid them and secure new sales by offer of higher prices, when they thought the purchase a fortunate one and thus secure the profits in that event, and leave the buyer to suffer the loss if the property depreciated in value, or if the purchase was unwise. It is of the greatest importance, in order that property may bring a fair price, to encourage bidding by giving to every bidder the benefits of bids made in good faith and without collusion or misconduct, and at least when the price offered is not unconscionably below the market value of the property. Nothing could more evidently tend to discourage and prevent bidding than a judicial determination that such a bidder may be deprived of the advantage of his accepted bid whenever any purchaser is willing to give a better price.[68]

Public policy and justice to the interests of all the parties require that the ratification of judicial sales by courts having jurisdiction over them should be final and conclusive, in the absence of irregularities made by the court, or unless the purchaser was prevented by misrepresentation or fraud from making his objections to the ratification in due time. And it must further appear that such misrepresentation or fraud resulted from some act or conduct on the part of the trustees or on the part of someone interested in the proceedings.[69]

This well known practice is in accord with the policy of our laws respecting such sales, which are required to be made after sufficient publicity and by public outcry to the highest bidder. The interests of the owners in particular cases must give way to the maintenance of the practice which in general, is in the highest degree beneficial.[70]

With this end in view, and realizing that without stability in

177 N. W. 635; Pewabic Min. Co. v. Mason (1892), 145 U. S. 349, 12 Sup. Ct. 887.

[68] Chicago City Bk. & Tr. Co. v. Johnson (1938), 293 Ill. App. 564, 13 N. E. (2d) 191; New Jersey Nat. Bk. & Tr. Co. v. Savemore Realty Co. (1931), 107 N. J. Eq. 478, 153 Atl. 480; Free v. Harris (1930), 181 Ark. 644, 27 S. W. (2d) 510; Greer v. McAninch (1928), 226 Ky. 644, 11 S. W. (2d) 696; Morrison v. Burnette (1907), 154 Fed. 617; Morrisse v. Inglis (1890), 46 N. J. Eq. 306, 19 Atl. 16.

[69] Clemens v. Union Trust Co. (1936), 170 Md. 520, 185 Atl. 462.

[70] Free v. Harris (1930), 181 Ark. 644, 27 S. W. (2d) 510.

judicial sales property cannot be expected to bring its full value, it long has been the settled rule that mere inadequacy of price, standing alone, is insufficient grounds for setting aside a sale unless the circumstances attending the sale may reasonably be calculated to have caused such inadequacy. This policy of the law is founded on the interests of the owner and purchaser alike.[71]

The purchaser at a judicial sale has rights that require the protection of law the same as the owner. And to deprive a bona fide purchaser of the benefits derived from an advantageous bid made at a fairly and lawfully conducted sale, without just and cogent reasons for so doing, or to enjoin a mortgagee from the exercise of his legal right to foreclose a mortgage upon default, merely because the time happened to be unpropitious for the sale, smirks suspiciously of deprivation of property without due process of law in violation of the Constitution of the United States.[72]

It is true that in extraordinary times equity will invoke extraordinary remedies, still economic conditions however deplorable can never warrant a court's disregard of the constitutional rights of the parties.[73] "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power," said Chief Justice Hughes in the Schechter case;[74] and again in the Blaisdell case:[75] "Emergency does not create power. Emergency

[71] Chicago Title & Tr. Co. v. Robin (1935), 361 Ill. 261, 198 N. E. 4; Clegg v. Christensen (1931), 346 Ill. 314, 178 N. E. 725; Greer v. McAninch (1928), 226 Ky. 644, 11 S. W. (2d) 696; Marten v. Jirkovsky (1927), 174 Ark. 417, 295 S. W. 365; Crist v. McCoy (1919), 287 Ill. 641, 122 N. E. 857; Buckner's Trustee v. Buckner (1916), 168 Ky. 302, 181 S. W. 1107; Jones v. Deposit & Peoples Bank (1918), 180 Ky. 395, 202 S. W. 907; Rospigliosi v. New Orleans M. & C. R. Co. (1916), 237 Fed. 341; Ballentyne v. Smith (1907), 205 U. S. 285, 27 Sup. Ct. 527; Stevenson v. Gault (1917), 131 Ark. 397, 199 S. W. 112; Pewabic Mining Co. v. Mason (1892), 145 U. S. 349, 12 Sup. Ct. 887.

[72] Fifth Amendment, Constitution of the United States; 14th Amendment, Section 1, Constitution of the United States.

[73] Equitable Life Assur. Soc. v. Lickness (1935), 63 S. Dak. 618, 262 N. W. 206.

[74] Schechter Poultry Corp. v. United States (1935), 295 U. S. 495, 528, 55 Sup. Ct. 837, 842.

[75] Home Bldg. & Loan Assn. v. Blaisdell (1934), 290 U. S. 398, 425, 54 Sup. Ct. 231, 235.

does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power * * * were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions which have always been, and always will be, the subject of close examination under our constitutional system."

The framers of the Constitution, imbued with the wisdom obtained by experience and study of the causes of the rise and fall of republics, ancient and modern, and seeking the stability and perpetuity of the government then in process of formation, set about the great task of formulating the Constitution which, when completed, was submitted to the people for ratification. One of the great objects, if not the paramount purpose, was to declare in plain and unambiguous language a written Constitution which, when adopted should be, as it has been throughout the life of the republic, and is now, the supreme law of the land guaranteeing to the people as a whole the right of life, liberty and the pursuit of happiness, and at the same time by definite limitation, controlling the various branches of the government and bringing within certain bounds the powers of those from time to time entrusted with the administration of public affairs. Such a Constitution is written evidence of the people's will, and is binding alike upon every officer or branch of the government and the individuals who comprise the nation as a whole.[76]

"Time has proven the discernment of our ancestors." said Justice Davies in *Ex parte* Milligan.[77] "Those great and good men foresaw that troubulous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more

[76] Kenley v. Huntington Bldg. & Loan Assn., Inc. (1934), 166 Md. 182, 170 Atl. 526.

[77] *Ex parte* Milligan (1866), 4 Wall. (71 U. S.) 2, 120, 121.

pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence."

It required no prophetic or superhuman mind to realize that in the years then to come there would arise temporary emergencies creating stress and unrest among the people, but determining in no uncertain terms that, if the nation was to live, it must live and progress under and within the terms of a written constitution. It is in times of emergency, stress and violence that we need the whole strength of an unbroken constitution to save us from destruction.[78]

An economic depression is undeniably a national emergency, and in times of national emergencies, not only is there authority, but there is clearly a duty upon all the branches of government, the executive, and legislative as well as upon courts of law and equity, to use every lawful means to alleviate the stress and tension of the resultant situation. Nevertheless, courts of law and equity are as much bound by the Constitution as are the other branches of government; and equity, except as is hereinbefore set forth, can not and will not, interfere with the lawful and orderly procedure of foreclosure.

[78] Kenley v. Huntington Bldg. & Loan Assn., Inc. (1934), 166 Md. 182, 170 Atl. 526; Loma Holding Corp. v. Cripple Bush Realty Corp. (1933), 147 Misc. (N. Y.) 655, 265 N. Y. S. 125.